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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

KENNETH L. MAYO
*Petitioner,*

vs.

STATE OF MISSOURI
*Respondent.*

MARY KRISTEN BECKER
*Petitioner,*

vs.

DIRECTOR OF REVENUE
*Respondent.*

On Petition for a Writ of Certiorari to the
Missouri Supreme Court

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

(1) Whether the Double Jeopardy Clause of the Fifth Amendment is violated when the State of Missouri prosecutes a person for driving while intoxicated after having suspended or revoked that person's driver's license for the same conduct in a separate administrative proceeding?

(2) Whether the Double Jeopardy Clause of the Fifth Amendment is violated when the State of Missouri suspends or revokes a person's driver's license in an administrative proceeding after having prosecuted that person for the same conduct in a separate criminal proceeding?

(3) Whether an administrative suspension or revocation of a driver's license based upon the driver's arrest for driving while intoxicated and a subsequently determined blood alcohol concentration of 0.10% or more constitutes "punishment" for double jeopardy purposes?

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners, Kenneth L. Mayo and Mary Kristen Becker, pray that a Writ of Certiorari issue to review the judgment of the Missouri Supreme Court, which ruled that the protection against multiple punishment for the same offense as guaranteed by the Double Jeopardy Clause of the Fifth Amendment is not violated when the state prosecutes a person for the crime of driving while intoxicated in violation of Mo. Rev. Stat. § 577.010 (1994), and in addition, suspends or revokes that person's driving privileges for the same conduct in a separate proceeding pursuant to Mo. Rev. Stat. §§ 302.500–.541 (1994).

## OPINION BELOW

The opinion of the Missouri Supreme Court was issued on February 20, 1996, and is reported at 915 S.W.2d 758 (Mo.banc 1996). A copy of the opinion is reprinted in Appendix A.

## JURISDICTION

The decision of the Missouri Supreme Court in the consolidated cases of *State. v Kenneth L. Mayo*, and *Mary Kristen Becker v. Director of Revenue*, 915 S.W.2d 758 (Mo. banc 1996), was issued on February 20, 1996. This petition is being filed within 90 days of the issuance of the Missouri Supreme Court's opinion.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that:

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . .

The Fourteenth Amendment to the United States Constitution provides in relevant part that:

> No state shall . . . deprive any person of life, liberty or property without due process of law, . . . .

This case involves Mo. Rev. Stat. §§ 302.500–.541 (1994), Suspension and Revocation, Administrative Procedure, and Mo. Rev. Stat. § 577.010 (1994), Driving While Intoxicated. The text of said statutes is set out in Appendix B and C, respectively.

## STATEMENT OF THE CASE

These consolidated cases arose out of similar circumstances in which the State of Missouri sought to suspend or revoke petitioners' driver's licenses based upon their arrests for driving while intoxicated and a subsequently determined blood alcohol content of 0.10% or more, pursuant to Mo. Rev. Stat. § 302.505, and in addition, prosecute them for driving while intoxicated in violation of Mo. Rev. Stat. § 577.010 in a separate proceeding.

Mo. Rev. Stat. § 302.505 provides for the suspension or revocation of the driver's license of a person who is arrested upon probable cause to believe he or she was driving while intoxicated and who thereafter takes a chemical test which reveals that he or she has a blood alcohol concentration of 0.10% or more. If the person's driving record shows no prior alcohol related contacts during the preceding five years, the period of suspension is 30 days, followed by a 60–day period of restricted driving. The period of revocation is one year if the person's driving record shows one or more prior alcohol related contacts during the preceding five years. Mo. Rev. Stat. § 302.525.2. The suspension or revocation is effective 15 days after the driver receives notice thereof unless an administrative hearing is requested within that period. Mo. Rev. Stat. § 302.530.1. If an administrative hearing is requested, it is to be conducted by examiners licensed to practice law in Missouri who are em-

ployed by the Department of Revenue. The issues to be determined at the hearing are whether a preponderance of the evidence establishes that the person was arrested upon probable cause to believe that he or she was driving while intoxicated, and was subsequently determined to have an alcohol concentration of 0.10% or more by weight of alcohol in his or her blood. Mo. Rev. Stat. § 302.530.4. Any person aggrieved by the decision of the examiner may file a petition for trial de novo in the circuit court of the county where the arrest occurred. The burden of proof shall be on the State to adduce evidence at the hearing to justify the basis for the suspension or revocation. Mo. Rev. Stat. § 302.535. The disposition of any criminal charges arising out of the same occurrence is independent of, and does not affect, any suspension or revocation under the statutory scheme. Mo. Rev. Stat. § 302.505.3.

On September 16, 1994, petitioner Kenneth L. Mayo was charged with the crime of driving while intoxicated in violation of Mo. Rev. Stat. § 577.010. The Director of Revenue, in a separate administrative action under Mo. Rev. Stat. §§ 302.500–.541, revoked Mr. Mayo's drivers license for one year effective December 4, 1994. On March 3, 1995, Mr. Mayo filed a motion to dismiss the criminal proceeding. As grounds for the motion, Mr. Mayo contended that, in view of the prior license revocation, the criminal proceeding violated the Double Jeopardy Clause's prohibition against multiple punishment for the same offense. The trial court sustained Mr. Mayo's motion and dismissed the action. The State filed a timely appeal to the Missouri Court of Appeals, Western District.

Petitioner Mary Kristen Becker was charged with driving while intoxicated in violation of Mo. Rev. Stat. § 577.010. On September 7, 1994, she entered a plea of guilty as charged and was placed on probation for a period of two years. In a separate action, the Director of Revenue suspended Ms. Becker's driving privileges pursuant to Mo. Rev. Stat. § 302.500–.541. Ms.

Becker then filed a petition for trial de novo in the Circuit Court of Franklin County to contest the suspension. At her de novo hearing, Ms. Becker filed a motion asserting that the suspension violated the Double Jeopardy Clause of the United States Constitution, in that the State was seeking to punish her twice for the same conduct. She requested that the Court set aside the suspension. The trial court sustained the motion, and the Director appealed to the Missouri Court of Appeals, Eastern District.

The Missouri Supreme Court granted transfer in both cases prior to any decisions being rendered by the respective Courts of Appeal. Thereafter, on February 20, 1996, the Missouri Supreme Court issued its opinion reversing the decision of the trial court in both cases. The basis of the Missouri Supreme Court's decision was its conclusion that neither Mr. Mayo nor Ms. Becker were subjected to multiple punishment for the same offense because an administrative suspension or revocation imposed pursuant to Mo. Rev. Stat. § 302.505 does not constitute "punishment" for double jeopardy purposes.

## REASONS FOR GRANTING THE WRIT

### I. THE TEST APPLIED BY THE MISSOURI SUPREME COURT — THAT A CIVIL SANCTION THAT IS LARGELY REMEDIAL DOES NOT CONSTITUTE PUNISHMENT EVEN THOUGH IT SERVES IN PART TO PUNISH – CONFLICTS WITH THE DECISIONS OF THIS COURT IN *UNITED STATES V. HALPER*, 490 U.S. 435 (1989) and *AUSTIN V. UNITED STATES*, 509 U.S. ___, 113 S.Ct. 2801 (1993), WHICH PROVIDE THAT A CIVIL SANCTION THAT IS NOT SOLEY REMEDIAL BUT CAN ONLY BE EXPLAINED IN PART AS INTENDED TO PUNISH CONSTITUTES PUNISHMENT.

The determining issue before the Missouri Supreme Court in *State v. Mayo*, 915 S.W.2d 758 (Mo.banc 1996), was whether an administrative suspension and revocation imposed pursuant to Mo. Rev. Stat. § 302.505 constitutes "punishment" within the ambit of the Double Jeopardy Clause of the Fifth Amendment.[1] If such a suspension or revocation constitutes "punishment", the Double Jeopardy Clause is violated when the State seeks to impose the suspension or revocation as well as a criminal penalty for the same offense in a separate proceeding. *United States v. Halper*, 490 U.S. 435, 446–49 (1989). In finding that such a sanction did not amount to "punishment" for double jeopardy purposes, the Missouri Supreme Court disregarded the test set out in *United States v. Halper*, *supra*, and *Austin v. United States*, 509 U.S. ___, 113 S.Ct. 2801 (1993) for determining when a civil sanction constitutes "punishment", and fashioned its own test from selective language contained in *Halper* to rule against the petitioners. Accordingly, this Court should grant

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[1] The fifth amendment to the United States Constitution is applicable to the states through the fourteenth amendment. *Benton v. Maryland*, 395 U.S. 784 (1969).

certiorari to review the decision of the Missouri Supreme Court in *Mayo*.

This Court initially faced the questions of whether and under what circumstances a civil sanction can constitute "punishment" for double jeopardy purposes in *Halper*. Halper was prosecuted and convicted on 65 counts of violating the criminal false–claims statute for overbilling the government for Medicare services. Total overcharges paid to Halper amounted to the sum of $585.00. Thereafter,the government sued Halper under the civil False Claims Act based on the same facts that gave rise to his criminal convictions. Specific provisions of the Act provided for a civil penalty up to $2,000 per violation. In Halper's case, this amounted to a penalty in excess of $130,000.00. Halper's case reached this Court after the district court granted summary judgment for the government in the civil case but refused to impose the $130,000.00 statutory penalty on the ground that it would constitute a second "punishment" for double jeopardy purposes.

As a threshold matter, this Court pointed out that the labels affixed to the relevant proceedings – whether they are criminal, civil or administrative – are not controlling in determining whether a sanction constitutes punishment. The Court then set out the test for determining whether a civil sanction constitutes punishment for double jeopardy purposes.

> [T]he determination whether a given sanction constitutes punishment . . . requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. . . . [A] civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.
>
> These goals are familiar. We have recognized . . . that punishment serves the twin aims of retribution and deterrence. . . . From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial

> purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

*United States v. Halper*, 490 U.S. at 448. Applying said analysis to Halper's case, this Court agreed with the district court that the imposition of the full civil penalty of $130,000.00 authorized by the False Claims Act constitutes punishment because of the "tremendous disparity" between that amount and the actual damages Halper caused the government. *Halper*, 490 U.S. at 452. This Court reasoned that, while the government was entitled to remedial justice, the sanction authorized by the Act did not solely serve a remedial purpose as applied to Halper's individual situation. *Id.* at 446, 452.

The reasoning applied by the Missouri Supreme Court to find that an administrative suspension or revocation under Mo. Rev. Stat. § 302.505 does not constitutes punishment conflicts with this Court's decision in *Halper*. The Missouri Court opined that *Halper* sets forth conflicting analyses for determining when a civil sanction constitutes punishment. *State v. Mayo*, 915 S.W.2d at 760, App. A at A-4. In addition to the "solely remedial" analysis (i.e., the principle that a civil sanction that is not solely remedial but can only be explained in part as intended to punish and deter, constitutes punishment), the Missouri Supreme Court believed *Halper* set out a second test; that a civil sanction that is largely remedial does not constitute punishment despite the fact that it serves in part to punish and deter. *Id.* at 760–61. The Missouri Supreme Court lifted this "largely remedial" analysis from this Court's specific holding in *Halper*:

> We therefore hold that a defendant who has already been punished in a criminal proceeding may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

*State v. Mayo*, 915 S.W.2d at 762, App. A at A-4 (quoting *United States v. Halper*, 490 U.S. at 448–449).

Contrary to the conclusion of the Missouri Supreme Court, *Halper* does *not* set forth conflicting analyses for determining when a civil sanction constitutes punishment. The above–quoted language setting out the specific holding in *Halper* is contained in the same paragraph as, and immediately follows, this Court's pronouncement that "a civil sanction that cannot be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." *Id.* These statements can, and should, be read as being consistent with one another – not as conflicting analyses between which a court must choose.

The Missouri Supreme Court is perhaps confused by this Court's statement in *Halper* that it was announcing a "rule for the rare case." *Halper*, 490 U.S. at 449. Based on this language, the Missouri Supreme Court believed that the "solely remedial" analysis could not be the correct test because "if the second sanction must be "solely remedial", then cases such as *Halper* would be the rule and not the exception." *State v. Mayo*, 915 S.W.2d at 762, App. A at A-7.

The Missouri Supreme Court's reasoning is flawed in that it fails to recognize that *Halper* was dealing with the application of a fixed penalty provision designed to do no more than make the government whole. *Halper*, 490 U.S. at 449. A civil sanction imposed under such a statute normally does not constitute punishment except in the *rare* case, such as *Halper*, where "a fixed penalty–provision subjects a prolific but small gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." *Id.* at 449. The rule "for the rare case" language applies to Halper's particular situtation only, and does not change the general rule set out in *Halper*.

*Halper* stands for the general proposition that the "solely remedial" analysis is the proper test to apply in determining whether a civil sanction constitutes punishment for double jeopardy purposes. Any doubts to the contrary are dispelled by this Court's decision in *Austin v. United States*, 509 U.S.___, 113 S.Ct. 2801 (1993), where this Court reaffirmed and applied the "solely remedial" test in the context of determining whether a statutory *in rem* forfeiture scheme constitutes punishment.

Austin was convicted in state court in South Dakota of possessing cocaine with intent to distribute. Thereafter, the United States filed an *in rem* forfeiture proceeding against his mobile home and auto body shop. The government's theory was that these facilities were used to facilitate the commission of the drug offense for which Austin had been convicted in state court. Austin contended that the forfeiture of his properties would violate the Eighth Amendment's prohibition against excessive fines.

The issue before the Court was whether the statutory forfeiture constituted "punishment". Unlike this Court's decision in *Halper*, which focused on whether the sanction as applied to Halper individually served the goals of punishment, the *Austin* decision focused on the statutory scheme as a whole. *Id.* at 2812 n.14. In determining whether the statutory scheme constituted punishment, this Court specifically noted that sanctions frequently serve more than one purpose and that a sanction that serves in part to punish constitutes punishment regardless of whether it also has a remedial purpose.

> In considering this question, we are mindful of the fact that sanctions frequently serve more than one purpose. We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause. We, however, must determine that it can only be explained as serving in part to punish. We said in *Halper* that "a civil sanction that cannot fairly be said

> solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." (citation omitted)

*Austin v. United States*, 113 S.Ct. at 2806. *See also Id.* at 2810 n.12. Applying these principles, this Court concluded that, "in light of the historical understanding of forfeiture as punishment, the clear focus on . . . the culpability of the owner and the evidence that Congress understood these provisions as serving to deter and punish", the forfeiture provisions cannot fairly be said solely to serve a remedial purpose. *Id.* at 2812. Thus, this Court held that the statutory forfeiture constituted punishment. *Id.*

The Missouri Supreme Court recognized that *Austin* applied the "solely remedial" test and conceded that under said test, an administrative suspension or revocation imposed pursuant to Mo. Rev. Stat. § 302.505 would constitute punishment. *Mayo* 915 S.W.2d at 760-61, App. A at A-5, A-6. However, it attempted to distinguish *Austin* on the grounds that it involved the Excessive Fines Clause of the Eighth Amendment rather than Double Jeopardy Clause of the Fifth Amendment, and on the fact that fines have traditionally been characterized as punishment. *Id.* at 762, App. A at A-8. These distinctions are without merit. First, "punishment" is "punishment" whether it is imposed under the Double Jeopardy Clause or the Eighth Amendment Excessive Fines Clause. *See United States v. $405,089.23*, 33 F.3d 1210, 1219 (9th Cir. 1994), *opinion amended on denial of rehearing*, 56 F.3d 41 (9th Cir. 1995), *cert. granted*, 116 S.Ct. 762 (1995) (the test for determining punishment under Excessive Fines Clause is the same as that for determining punishment under the Double Jeopardy Clause). Second, the Missouri Supreme Court has on more than one occasion characterized an administrative suspension or revocation imposed pursuant to Mo. Rev. Stat. § 302.505, at least in part, as punishment. *Mayo*, 915 S.W.2d at 762, App. A at A-9; *Vetter v. King*, 691 S.W.2d 255, 257 (Mo. banc 1985).

The analysis of whether a suspension or revocation of a driver's license pursuant to Mo. Rev. Stat. § 302.505 constitutes punishment is comparable with that applied by this Court in *Austin*, where the focus was on the statutory scheme as a whole rather than on the application of the statute to a particular individual. *Austin*, 113 S. Ct. at 2812 n.14. Under that analysis, "a civil sanction that cannot fairly be said solely to serve a remedial purpose but can only be explained as also serving either retributive or deterrent purposes, is punishment." *Id.* at 2812.

The Missouri statutory scheme, Mo. Rev. Stat. §§ 302.500–.541, focuses on the culpability and criminal history of the person who operates a motor vehicle while intoxicated. A one–year revocation is imposed in lieu of a shorter suspension if the driver has a prior alcohol related contact within the preceding five years. As conceded by the Missouri Supreme Court, an administrative suspension and revocation imposed pursuant to Mo. Rev. Stat. § 302.505 is *not* solely remedial and can only be explained in part as an effort to punish and deter those who drink and drive. *State v. Mayo*, 915 S.W.2d at 762, App. A at A-9. Although suspensions and revocations imposed pursuant to §§ 302.500–.541 also serve the remedial purpose of expeditiously removing drunk drivers from the road, that does not change the fact that such sanctions constitute "punishment" under this Court's analysis in *Halper* and *Austin*. *See Austin*, 113 S.Ct. at 2812.

## CONCLUSION

The decision of the Missouri Supreme Court holding that an administrative DWI suspension or revocation imposed pursuant to Mo. Rev. Stat. § 302.505 is not punishment because the suspension serves a largely remedial purpose and cannot be characterized as only a deterrent or retributive measure, directly conflicts with this Court's decisions in *Halper* and *Austin*. Certiorari should be granted to review the decision of the Missouri Supreme Court in *Mayo* because the Missouri Supreme Court's decision disregards the proper test set out by this Court for determining when a civil sanction constitutes punishment, and in the process, erodes the important and fundamental protection against multiple punishment afforded by the Doulble Jeopardy Clause.

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## APPENDIX A

SUPREME COURT OF MISSOURI
en banc

No. 78298

STATE OF MISSOURI,
Appellant,

vs.

KENNETH L. MAYO,
Respondent.

APPEAL FROM THE CIRCUIT COURT
OF JACKSON COUNTY
Judge Vernon E. Scoville, III

(Consolidated)

No. 78335

MARY KRISTEN BECKER,
Respondent,

vs.

DIRECTOR OF REVENUE,
Appellant.

APPEAL FROM THE CIRCUIT COURT
OF FRANKLIN COUNTY
Judge John C. Brackmann

[Duplicate of Filing On: Feb. 20, 1996]

In these two cases, consolidated on the Court's own motion, the State appeals the dismissal of its criminal prosecution against respondent Kenneth Mayo for driving while intoxicated, and the Director of Revenue (Director), having suspended Mary Becker's

driving privileges, appeals an order reinstating those privileges. The trial court in both cases ruled that the proceedings violated the Double Jeopardy Clause of the Fifth Amendment. We now reverse and remand both cases.

The facts of these cases are not in dispute and need only to be stated briefly.

On September 16, 1994, respondent Kenneth Mayo was charged with the crime of driving while intoxicated (DWI) in violation of § 577.010, RSMo 1994. The Director, in a separate administrative action, revoked Mayo's driver's license for one year effective December 4, 1994, pursuant to § 302.500, RSMo 1994, *et seq.* Thereafter, on March 3, 1995, Mayo filed a motion to dismiss the criminal proceeding. As grounds for the motion, Mayo contended that in view of the prior license revocation, the criminal proceeding violated the Double Jeopardy Clause of the Fifth Amendment. The trial court sustained Mayo's motion and dismissed the action. The State appealed to the Court of Appeals, Western District, and this Court granted transfer prior to opinion. *Rule 83.06.*

In the second case, respondent Mary Becker was also charged with DWI in violation of § 577.010. She entered a plea of guilty on September 7, 1994, and was placed on probation for two years. In a separate action, the Director suspended Becker's driving privileges according to § 302.500, *et seq.* Becker then filed a petition for a trial de novo in the Circuit Court of Franklin County to contest the suspension. Prior to trial, Becker filed a motion asserting that the suspension violated the Double Jeopardy Clause and requesting reinstatement of her license. When the trial court sustained the motion, the Director appealed to the Court of Appeals, Eastern District. This Court granted transfer prior to opinion. *Rule 83.06.*

The State and the Director raise two points on appeal: (1) that the revocation or suspension of a driver's license does not violate

the Double Jeopardy Clause because it does not constitute additional punishment, and (2) that even if the revocation of a driver's license is punishment, it does not violate the Double Jeopardy Clause because it is not imposed for the "same offense" under the test set out in *Blockburger v. United States*, 284 U.S. 299 (1932). Because this Court finds the first point dispositive, we do not reach the second point.

The Double Jeopardy Clause of the Fifth Amendment states, "nor shall any person be subject for the same offence [sic] to be twice put in jeopardy of life or limb. . . ." U.S. Const., Amend. V. Three distinct abuses are prevented by the Double Jeopardy Clause: (1) a subsequent prosecution for the same offense after acquittal; (2) a subsequent prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *United States v. Halper*, 490 U.S. 435, 440 (1989) (citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)). Only the third of these protections is at issue in these cases. Obviously, the criminal sanctions imposed under § 577.010 — incarceration and/or fine — are punishment within the meaning of the Double Jeopardy Clause. However, to characterize the civil revocation of an individual's driver's license as "punishment" is problematic.

Whether a proceeding is labeled as civil or criminal is "not of paramount importance" because both criminal and civil sanctions may serve remedial and punitive goals at the same time. *Halper*, 490 U.S. at 447. The determination of whether a particular sanction involves a punishment that violates the Double Jeopardy Clause :requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. Simply put, a civil . . . sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment." *Id.* at 448. Those goals are "the twin aims of retribution and deterrence." *Id.*

The sanctions imposed in *Halper* are illustrative. Defendant was convicted under the criminal false-claims statute, 18 U.S.C. § 287, for submitting 65 falsified Medicare claims. *Id.* at 437. He was sentenced to two years in prison and fined $5,000. *Id.* The total amount that Halper had overcharged the government was $585. *Id.* Subsequent to his criminal conviction, the government brought a civil action under the False Claims Act, 31 U.S.C. §§ 3729-3731, which mandated a fine against Halper of $130,000, a figure over 220 times greater than the government's measurable loss. *Id.* at 438-39. On appeal, the Supreme Court held that the disparity between the District Court's approximation of the government's expenses and the mandated fine was so large that the fine constituted a second punishment. *Id.* at 452.

In reaching that conclusion, the Court set forth seemingly conflicting analyses for determining when civil sanctions constitute punishment. First, the Court stated:

> From these premises, it follows that a civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

*Id.* at 448 (emphasis added). In the very next sentence, however, the Court stated:

> We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but *only* as a deterrent or retribution.

*Id.* at 448-49 (emphasis added). Respondents Mayo and Becker, drawing on the first sentence, contend that a civil sanction is punishment unless it serves solely a remedial purpose. The State

and the Director rely on the second sentence for the proposition that a civil sanction is punishment if it serves *only* as a deterrent or as retribution. The difference is critical: If license revocation or suspension is both remedial and punitive, it is not solely remedial, and under respondents' version of *Halper*, the sanction is punishment.

The confusion is exacerbated by two subsequent United States Supreme Court cases that refer to *Halper*: *Austin v. United States*, 509 U.S. ___, 113 S.Ct. 2801 (1993); and *Department of Revenue of Montana v. Kurth Ranch*, ___ U.S. ___, 114 S.Ct. 1937 (1994). Neither case, however, expressly addresses the conflict shown above.

In *Austin*, the Supreme Court again confronted the issue of whether civil sanctions constitute punishment, this time in the context of the Excessive Fines Clause of the Eighth Amendment. Defendant Austin pled guilty to state charges of possessing cocaine with intent to distribute and was sentenced to seven years imprisonment. *Id.* at 2803. Thereafter, the United States filed an *in rem* action seeking forfeiture of Austin's mobile home and auto body shop. *Id.* In response to the contention that the forfeiture was punishment, and therefore subject to the Excessive Fines Clause, the Court said:

> In considering this question, we are mindful of the fact that sanctions frequently serve more than one purpose. We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause. We, however, must determine that it can only be explained as serving in part to punish. We said in *Halper* that 'a civil sanction that cannot fairly be said to solely serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.'

*Id.* at 2806. Applying the foregoing "solely remedial" analysis, the Court held that the forfeiture was punishment that was prohibited under the Excessive Fines Clause because it served not only a remedial purpose but also a deterrent purpose. *Id.* at 2810, 2812, and n.14.[1]

In *Department of Revenue of Montana v. Kurth Ranch*, ___ U.S. ___, 114 S.Ct. 1937 (1994), a double jeopardy case, the Supreme Court briefly revisited *Halper*. The case involved the State of Montana's imposition of a tax on dangerous drugs. *Id.* at 1941. Members of the Kurth family had pled guilty to criminal charges of possession of marijuana with intent to sell. *Id.* at 1942. The State then attempted to collect almost $900,000 in taxes on the marijuana. *Id.* at 1942-43. Despite *Austin* , which was handed down just a year earlier, the Supreme Court restated that under *Halper*, punishment means a "sanction [that] may not fairly be characterized as remedial, but only as a deterrent or retribution.." *Id.* at 1945. Having acknowledged *Halper*, the Court then held its analysis was inapplicable to the taxing statutes because taxing statutes, by their nature, serve the non-punitive purpose of raising revenue. *Id.* at 1946, 1948. As the Court tacitly explained, taxing statutes, which have neither a punitive nor a remedial purpose, are different than civil fines in *Halper*, which served, as least in part, the remedial purpose of restitution. To resolve *Kurth Ranch*, the Court compared the Montana taxing statute to standard taxing statutes and concluded that it was so far removed from the revenue raising purpose that it must be punishment, but under different reasoning than the civil sanction in *Halper*.

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[1] Apparently *Austin's* claim was brought under the Excessive Fines Clause because it could not have been brought under the Double Jeopardy Clause. Successive prosecutions by different sovereigns do not violate the Double Jeopardy Clause, *see, e.g., Bartkus v. Illinois*, 359 U.S. 121 (1959); *Abbate v. United States*, 359 U.S. 187 (1959); the criminal prosecution against Austin was a state proceeding, and the forfeiture case was a federal proceeding.

From a closer reading of *Halper,* itself, we conclude that the Supreme Court did not intend for the "solely remedial" analysis to apply to the revocation or suspension of driving privileges.[2] It is significant that the Court, at the outset of the *Halper* opinion, framed the issue as "whether a civil sanction, in application, may be so divorced from any remedial goal that it constitutes punishment for the purpose of double jeopardy analysis." *Halper,* at 443. Implicit in the language is the notion that civil sanctions that are not "so divorced," sanctions that are largely remedial but are in fact partly punitive, do not constitute punishment for double jeopardy purposes. Further, the Court made clear that it was establishing a "rule for the rare case," *Id.* at 449, which, in effect, precludes the "solely remedial" analysis. If the second sanction must be "solely remedial," then cases such as *Halper* would be the rule and not the exception because it would be a rare sanction indeed that was wholly remedial, without the slightest retributive or deterrent effect. Most importantly, what followed *Halper's* "solely remedial" analysis was the actual *holding* of the case. To reiterate, the Court stated:

> We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may be subjected to an additional civil sanction

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[2] Our conclusion is supported by all of the cases from other states that have considered the issue. *See e.g. People v. Lopez,* No. 4-95-0413, 1995 WL 765631, at *2-4 (Ill. App. Dec. 29, 1995); *People v. Dvork,* No. 2-95-0520, 1995 WL 736320, at *3 (Ill. App. Dec. 13, 1995); *State v. Parker,* 538 N.W.2d 141, 142 (Minn. App. 1995); *State v. Hanson,* Nos. C1-95-531, C1-95-535, 1996 WL 17395, at *5 (Minn. Jn. 19, 1996); 532 N.W.2d 598, 600-01 (Minn. App. 1995); *Ex Parte Tharp,* No. 2-95-208-Cr, 1995 WL 756208, at *2 (Tex. App. Dec. 21, 1995); *State v. Strong,* 605 A.2d 510. 512 (Vt. 1992); *State v. Zerkel,* 900 P.2d 744, 756 (Alaska App. 1995); *Johnson v. State,* 622 A.2d 199, 202 (Md. Ct. Spec. App. 1993); *Butler v. Department of Public Safety and Corrections,* 609 So.2d 790, 797 (La. 1992); *State v. Nichols,* 819 P.2d 995, 998 (Az. App. 1991); *State v. Hickam,* No. 15256, 1995 WL 758457, at *2 (Conn. Dec. 26, 1995).

> to the extent that the second sanction may not fairly be characterized as remedial, but *only* as a deterrent or retribution.

*Id.* at 448-49 (emphasis added). The adoption of the ":solely remedial" analysis in *Austin* can only be explained by the fact that it involved the Excessive Fines Clause rather than the Double Jeopardy Clause, and fines, of whatever variety, have traditionally be characterized as punishment.

Governed by our understanding of *Halper,* we now undertake a "particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve." *Id.* at 448. Our determination of whether a sanction serves "the twin aims of retribution and deterrence" is not to be made from the defendant's perspective. *Id.* at 447 n.7. Indeed, as the Supreme Court observed, even wholly remedial sanctions may "carry the sting of punishment" for the defendant. *Id.*

Initially we note a fundamental difference between the fine levied in *Halper,* the tax statute in *Kurth Ranch,* and the license revocation in this case. A civil fine, like that in *Halper,* is punishment to the extent that it bears no relation to making the government whole. A taxing statute, like that in *Kurth Ranch,* is punishment to the extent that it is too far divorced from its legitimate, non-punitive purpose of raising revenue. On the other hand, a driver's license is a "privilege or a qualified right" that is granted by the state, *Blydenburg v. David,* 413 S.W.2d 284, 289 (Mo. banc 1967), and revocation of such a privilege "is characteristically free of the punitive criminal element." *Helvering v. Mitchell,* 303 U.S. 391,, 399 (1938). This does not mean, of course, that license revocation does not in some measure punish the defendant. To be sure, both the cases of this Court and the United States Supreme Court have recognized the dual nature of the driver's license revocation. In *Mackey v. Montrym,* 443 U.S. 1 (1978), the Supreme Court described the

differing purposes of Massachusetts's [sic] summary suspension law as follows:

> First, the very existence of the summary sanction of the statute serves as a deterrent to drunken driving. . . . . Third, in promptly removing such drivers from the road, the summary sanction of the statute contributes to the safety of public highways.

*Id.* at 18. This Court noted a similar dual nature in two cases handed down on the same day, both of which challenged the constitutionality of the 1983 and 1984 versions of the license revocation statutes. In *Vetter v. King*, 691 S.W.2d 255 (Mo. banc 1985), the Court noted, "The challenged statute gives clear signal that a person's self-induced inebriation may produce swift penalty and retributive justice if he or she also drives." *Id.* at 257. In *Collins v. Director of Revenue*, 691 S.W.2d 246 (Mo. banc 1985), the Court then stated, "It appears to us that the statute was designed to expeditiously remove the most dangerous drunk drivers from Missouri roadways." *Id.* at 252.

Certainly, a remedial purpose is served by removing from Missouri roadways those persons who have abused their driving privilege by driving under the influence of alcohol. Indeed, we believe that this remedial purpose, safety on Missouri roadways, is the overarching purpose of the statute. Further, we do not believe that the sanction is too far divorced from its remedial purpose so that it should be more fairly characterized as punishment. Therefore, this Court holds that the sanction of a license revocation or suspension under § 302.500, *et seq.*, is not punishment for the purposes of the Double Jeopardy Clause.

Respondents argue that the true punitive purpose of the sanction is shown by the increase of the suspension from thirty days to a year if the defendant has an "alcohol related enforcement contact" within the preceding five years. § 302.525, RSMo 1994. We disagree. The sanction is increased because the

defendant has been shown by the prior "alcohol related enforcement contract" to be highly dangerous, and the purpose for increasing the sanction is to ensure greater safety on the highways..

Finally, respondents argue that the Double Jeopardy Clause is violated because the license revocation or suspension originates from the same conduct that gives rise to the criminal prosecution. Respondents rely on *Kurth Ranch* for this proposition because imposition of the Montana drug tax was conditioned on the commission of a crime. That circumstance, however, was only one of several factors taken into account in the Court's opinion. The Court stated that Montana's dangerous drug tax was, "[t]aken as a whole, . . . a concoction of anomalies, too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of Double Jeopardy analysis." *Kurth Ranch,* 114 S.Ct. at 1948. The "anomalies" referred to included: 1) the enormously high rate of tax, eight times the market value; 2) the legislature's stated intent to deter drug production, sales, and use; 3) the conditioning of the tax on the commission of a crime; and 4) the imposition of the tax on property the defendant no longer owned. *Id.* at 1946-48 and n.18. The fact that the "sanction" was conditioned on the commission of a crime was not dispositive in *Kurth Ranch, id.* at 1947-48, nor should it be in this case.

The judgments are reversed, and the cases are remanded for proceedings not inconsistent with this opinion.

Stephen N. Limbaugh, Jr., Judge

All concur.

## APPENDIX B

## SUSPENSION AND REVOCATION, ADMINISTRATIVE PROCEDURE

**302.500. Definitions**.–As used in sections 302.500 to 302.540, the following terms mean:

(1) **"Alcohol concentration"**, the amount of alcohol in a person's blood at the time of the act alleged as shown by chemical analysis of the person's blood, breath, saliva or urine;

(2) **"Department"**, the department of revenue of the state of Missouri;

(3) **"Director"**, the director of the department of revenue or his authorized representative;

(4) **"Driver's license"** or "license", a license, permit, or privilege to drive a motor vehicle issued under or granted by the laws of this state. The term includes any temporary license or instruction permit, any nonresident operating privilege, and the privilege of any person to drive a motor vehicle whether or not the person holds a valid license;

(5) **"Revocation"**, the termination by formal action of the department of a person's license. A revoked license is not subject to renewal or restoration except that an application for a new license may be presented and acted upon by the department after the expiration of the revocation period;

(6) **"State"**, a state, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any province of Canada;

(7) **"Suspension"**, the temporary withdrawal by formal action of the department of a person's license. The suspension shall be for a period specifically designated by the department pursuant to the provisions of sections 302.500 to 302.540.

**302.505. Determination by department to suspend or revoke license, when made, basis–final, when.**–1. The department shall suspend or revoke the license of any person upon its determination that the person was arrested upon probable cause to believe he was driving a motor vehicle while the alcohol concentration in the person's blood or breath was ten–hundredths of one percent or more by weight of alcohol in his blood, based on the definition of alcohol concentration in section 302.500.

2. The department shall make a determination of these facts on the basis of the report of a law enforcement officer required in section 302.510, and this determination shall be final unless a hearing is requested and held. If a hearing is held, the department shall review the matter and make a final determination on the basis of evidence received at the hearing.

3. The determination of these facts by the department is independent of the determination of the same or similar facts in the adjudication of any criminal charges arising out of the same occurrence. The disposition of those criminal charges shall not affect any suspension or revocation under this section.

**302.510. Arresting officer, duties–certain arrests not to be basis for administrative suspension or revocation.**–1. Except as provided in subsection 3 of this section, a law enforcement officer who arrests any person for a violation of section 577.010 or 577.012, RSMo, or for a violation of a county or municipal ordinance prohibiting driving while intoxicated or a county of municipal alcohol related traffic offense, and in which the alcohol concentration in the person's blood or breath was ten–hundredths of one percent or more by weight, shall forward to the department a verified report of all information relevant to the enforcement action, including information which adequately identifies the arrested person, a statement of the officer's grounds for belief that the person violated section 577.010 or 577.012

RSMo, or a county or municipal ordinance prohibiting driving while intoxicated or a county or municipal alcohol related traffic offense, a report of the results of any chemical tests which were conducted, and a copy of the citation and complaint filed with the court.

2. The report required by this section shall be made on forms supplied by the department or in a manner specified by regulations of the department.

3. A county or municipal ordinance prohibiting driving while intoxicated or a county or municipal alcohol related traffic offense may not be the basis for suspension or revocation of a driver's license pursuant to sections 302.500 to 302.540, unless the arresting law enforcement officer, other than an elected peach officer or official, has been certified by the director of the department of public safety pursuant to the provisions of sections 590.100 to 590.150, RSMo.

**302.515. Notice of suspension or revocation by department–deemed received, when–contents.**–1. Upon receipt of the report of the law enforcement officer, the department shall make the determination described in section 302.505. If the department determines that the person is subject to license suspension or revocation, and if notice of suspension or revocation has not already been served upon the person by the enforcement officer as required in section 302.520, the department shall issue a notice of suspension or revocation.

2. The notice of suspension or revocation shall be mailed to the person at the last known address shown on the department's records, and to the address provided by the enforcement officer's report if that address differs from the address of record. The notice is deemed received three days after mailing, unless returned by postal authorities.

3. The notice of suspension or revocation shall clearly specify the reason and statutory grounds for the suspension or revoca-

tion, the effective date of the suspension or revocation, the right of the person to request a hearing, the procedure for requesting a hearing, and the date by which that request for a hearing must be made.

**302.520 Arresting officer to serve notice of suspension or revocation, when–to possess license, issue temporary permit, give written notice of driver's rights and responsibilities–application for hearing.**–1. Whenever the chemical test results are available to the law enforcement officer while the arrested person is still in custody, and where the results show an alcohol concentration of ten–hundredths of one percent or more by weight of alcohol in his blood, the officer, acting on behalf of the department, shall serve the notice of suspension or revocation personally on the arrested person.

2. When the law enforcement officer serves the notice of suspension or revocation, the officer shall take possession of any driver's license issued by this state which is held by the person. When the officer takes possession of a valid driver's license issued by this state, the officer, acting on behalf of the department, shall issue a temporary permit which is valid for fifteen days after its date of issuance and shall also give the person arrested a notice which shall inform him of his rights and responsibilities under sections 302.500 to 302.540. The notice shall be in such form so that the arrested person may sign the original as evidence of his receipt thereof. The notice shall also contain a detachable form permitting the arrested person to request a hearing. Signing the hearing request form and mailing such request to the department shall constitute a formal application for a hearing.

3. A copy of the completed notice of suspension or revocation form, a copy of any completed temporary permit form, a copy of the notice of rights and responsibilities given to the arrested person, including any request for hearing, and any driver's

license taken into possession under this section shall be forwarded to the department by the officer along with the report required in section 302.510.

4. The department shall provide forms for notice of suspension of revocation, for notice of rights and responsibilities for request a hearing and for temporary permits to law enforcement agencies.

**302.525. Suspension or revocation, when effective, duration– restricted driving privilege–effect of suspension or revocation by court on charges arising out of same occurrence.**–1. The license suspension or revocation shall become effective fifteen days after the subject person has received the notice of suspension or revocation as provided in section 302.520, or is deemed to have received the notice of suspension or revocation by mail as provided in section 302.515. If a request for a hearing is received by or postmarked to the department within that fifteen–day period, the effective date of the suspension or revocation shall be stayed until a final order is issued following the hearing; provided, that any delay in the hearing which is caused or requested by the subject person or counsel representing that person without good cause shown shall not result in a stay of the suspension or revocation during the period of delay.

2. The period of license suspension or revocation under this section shall be as follows:

(1) If the persons's driving record shows no prior alcohol related enforcement contacts during the immediately preceding five years, the period of suspension shall be thirty days after the effective date of suspension, followed by a sixty–day period of restricted driving privilege issued by the director of revenue for the limited purpose of driving in connection with the person's business, occupation, or employment, and to and from an alcohol education or treatment program. The restricted driving privilege

shall not be issued until he or she has filed proof of financial responsibility with the department of revenue, in accordance with chapter 303, RSMo, and is otherwise eligible. In no case shall restricted driving privileges be issued pursuant to this section or section 302.535 until the person has completed the first thirty days of a suspension under this section;

(2) The period of revocation shall be one year if the person's driving record shows one or more prior alcohol related enforcement contacts during the immediately preceding five years.

3. For purposes of this section, "alcohol related enforcement contacts" shall include any suspension or revocation under sections 302.500 to 302.540, any suspension or revocation entered in this or any other state for a refusal to submit to chemical testing under an implied consent law, and any conviction in this or any other state for a violation which involves driving a vehicle while having an unlawful alcohol concentration.

4. Where a license is suspended or revoked under this section and the person is also convicted on charges arising out of the same occurrence for a violation of section 577.010 or 577.012, RSMo, or for a violation of any county or municipal ordinance prohibiting driving while intoxicated or alcohol related traffic offense, both the suspension or revocation under this section and any other suspension or revocation under this chapter shall be imposed, but the period of suspension or revocation under sections 302.500 to 302.540 shall be credited against any other suspension or revocation imposed under this chapter, and the total period of suspension or revocation shall not exceed the longer of the two suspension or revocation periods.

**302.530. Request for administrative review, when made–temporary permit, duration–hearing, venue, conduct–decision, notice, final when–appeal for judicial review.**–1. Any person who has received a notice of suspension or revocation

may make a request within fifteen days of receipt of the notice for a review of the department's determination at a hearing. If the person's driver's license has not been previously surrendered, it must be surrendered at the time the request for a hearing is made.

2. At the time the request for a hearing is made, if it appears from the record that the person is the holder of a valid driver's license issued by this state, and that the driver's license has been surrendered as required, the department shall issue a temporary permit which will be valid until the scheduled date for the hearing. The department may later issue an additional temporary permit or permits in order to stay the effective date of the suspension or revocation until the final order is issued following the hearing, as required by section 302.520.

3. The hearing shall be held in the county where the arrest was made. The hearing shall be conducted by examiners who are licensed to practice law in the state of Missouri and who are employed by the department on a part–time or full–time basis as the department may determine.

4. The sole issue at the hearing shall be whether by a preponderance of the evidence the person was driving a vehicle under the circumstances set out in section 302.505. The burden of proof shall be on the state to adduce such evidence. If the department finds the affirmative of this issue, the suspension or revocation order shall be sustained. If the department finds the negative of the issue, the suspension or revocation order shall be rescinded.

5. The procedure at such hearing shall be conducted in accordance with chapter 536, RSMo, not otherwise in conflict with sections 302.500 to 302.540.

6. The department shall promptly notify, by certified letter, the person of its decision including the reasons for that decision. Such notification shall include a notice advising the person that

the department's decision shall be final within fifteen days from the date of certification of the letter unless the person challenges the department's decision within that time period by filing an appeal in the circuit court in the county where the arrest occurred.

7. Unless the person, within fifteen days after being notified by certified letter of the department's decision, files an appeal for judicial review pursuant to section 302.535, the decision of the department shall be final.

**302.535. Trial de novo, conduct, venue, associate judge may hear, when–restricted driving privilege, when, duration of.–** 1. Any person aggrieved by a decision of the department may file a petition for trial de novo by the circuit court. The burden of proof shall be on the state to adduce the evidence. Such trial shall be conducted pursuant to the Missouri rules of civil procedure and not as an appeal of an administrative decision pursuant to chapter 536, RSMo. The petition shall be filed in the circuit court of the county where the arrest occurred. The case shall be decided by the judge sitting without a jury. The presiding judge of the circuit court may assign a circuit judge or an associate circuit judge to hear such petition.

2. The filing of a petition for trial de novo shall not result in a stay of the suspension or revocation order. But upon the filing of such petition, a restricted driving privilege for the limited purpose of driving in connection with the petitioner's business, occupation, employment, or formal program of secondary, post–secondary or higher education shall be issued by the department if the person's driving record shows no prior alcohol related enforcement contact during the immediately preceding five years. Such limited driving privilege shall terminate on the date of the disposition of the petition for trial de novo.

3. In addition to the limited driving privilege as permitted in subsection 2 of this section, the department may upon the filing of a petition for trial de novo issue a restricted driving privilege

for the limited purpose of driving in connection with the petitioner's business, occupation, employment, or formal program of secondary, postsecondary or higher education. In determining whether to issue such a restrictive driving privilege, the department shall consider the number and the seriousness of prior convictions and the entire driving record of the driver.

4. Such time of restricted driving privilege pending disposition of trial de novo shall be counted toward any time of restricted driving privilege imposed pursuant to section 302.525. Nothing in this subsection shall be construed to prevent a person from maintaining his restricted driving privilege for an additional sixty days in order to meet the conditions imposed by section 302.540 for reinstating a person's driver's license.

**302.540. Reinstatement of license–completion of education or rehabilitation program a condition–individual assessment–fees and cost, distribution of.**–1. No person who has had his or her driver's license suspended or revoked under the provisions of sections 302.500 to 302.540 shall have that license reinstated until he or she has participated in and successfully completed an alcohol or drug related traffic offender education or rehabilitation program which meets or exceeds minimum standards approved by the department of mental health, except the department may waive such requirement upon completion of a comparable program or upon good cause shown.

2. Beginning July 1, 1994, the program shall provide a professional assessment for the identification of individual needs of the person who has had his or her driver's license suspended or revoked, and who is referred to the program. If the assessment results in a recommendation that the offender participate in a subsequent education or rehabilitation program, the court may order that the offender complete such program.

3. The cost of the program shall be paid by the person attending the program. Any person who attends the program

shall pay, in addition to any fee charged for the program, a supplemental fee of sixty dollars. The administrator of the program shall remit to the division of alcohol and drug abuse of the department of mental health the supplemental fees for all persons enrolled in the program, less two percent for administration costs. The supplemental fees received by the department of mental health pursuant to this section shall be deposited in the mental health earnings fund which is created in section 630.345, RSMo.

4. The department shall send a record of the participation and completion by the person of such program to the Missouri highway patrol for inclusion in the Missouri uniform law enforcement systems records.

5. Court ordered participation in an alcohol or drug related traffic offender education or rehabilitation program pursuant to section 577.049, RSMo, shall satisfy the requirements of this section if the court action arose out of the same occurrence that resulted in a person's license being administratively suspended or revoked.

**302.541. Additional reinstatement fee, license to operate motor vehicle, when.**–In addition to other fees required by law, any person who has had his license to operate a motor vehicle suspended or revoked following a determination, under section 302.505, RSMo, section 577.010, 577.041 or 577.510, RSMo, or any county or municipal ordinance, where the judge in such case was an attorney and the defendant was represented by or waived the right to an attorney, that he was driving while intoxicated or with a blood alcohol content of ten–hundredths of one percent or more by weight shall pay an additional fee of twenty–five dollars prior to the reinstatement or reissuance of his license.

## APPENDIX C

**577.010. Driving while intoxicated.**–1. A person commits the crime of **"driving while intoxicated"** if he operates a motor vehicle while in an intoxicated or drugged condition.

2. Driving while intoxicated is for the first offense, a class B misdemeanor. No person convicted of or pleading guilty to the offense of driving while intoxicated shall be granted a suspended imposition of sentence for such offense, unless such person shall be placed on probation for a minimum of two years.